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IN THE  
**Supreme Court of the United States**  
October Term, 1988

ALLEN ORGAN COMPANY,

*Petitioner,*

—v.—

KIMBALL INTERNATIONAL, INC.,  
MACMILLAN, INC.,  
CONN KEYBOARDS, INC.,

*Respondents.*

**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

ALBERT L. JEFFERS, *Counsel of Record*  
JOHN F. HOFFMAN  
JEFFERS, HOFFMAN & NIEWYK  
1500 Anthony Wayne Bldg.  
Fort Wayne, IN 46802  
(219) 426-1700  
*Counsel for Respondents*



## QUESTIONS PRESENTED FOR REVIEW

1. Where the jury returns possibly inconsistent special interrogatory answers which can be reconciled in only one logical and probable way, is the Seventh Amendment to the Constitution violated by the Federal Circuit's reconciliation of the interrogatory answers in that way, thereby affirming the lower court's judgment?

2. Does the Seventh Amendment to the Constitution require remand for a new trial when there are possibly inconsistencies in the jury's special interrogatory answers but the lower court reconciled such inconsistencies in the only logical, probable and plausible way possible?

3. Where the jury returns special interrogatory answers that are possibly

inconsistent, is the Seventh Amendment to the Constitution violated where the Court of Appeals follows established case law and resolves the possibly inconsistent answers in a logical and probable manner?

#### PARTIES

The caption contains the names of all parties. Herbourger Brooks, a British company, is a subsidiary of Kimball International, Inc. that is not wholly owned by Kimball.

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### STATEMENT OF THE CASE

The case below was a patent infringement case in which the validity of Allen Organ Company's ("Allen") patent 3,610,799 was at issue. Allen sought and was granted a jury trial. Following a five week trial, the twelve person jury returned answers to special interrogatories invalidating all claims of Allen's patent on various grounds enumerated in 35 USC §102. Certain claims were invalidated on as many as twelve separate grounds, as is detailed in the chart, submitted separately to this Court and entitled Jury Findings of Invalidity (Exhibit A). This chart was also presented to the Court of Appeals for the Federal Circuit. The jury was discharged without objection by either party on the

basis of the alleged inconsistencies later argued by Allen on appeal.

The Court of Appeals did not ignore the reconciliation method proposed by Allen. The Court considered Allen's proposed reconciliation method but rejected it.

In its Petition for Certiorari, Allen has chosen only to address the findings of anticipation under 35 USC §102(g), which states:

"A person shall be entitled to a patent unless--

...

(g) before the applicant's invention thereof the invention was made in this country by another who had not abandoned, suppressed, or concealed it..."

In the chart (Exhibit A), the 35 USC 102(g) grounds of invalidity are identified as "Wescott Prior Invention", "Bauscher Prior Invention" and "Klann/Conn Prior Invention". Allen does not now



challenge the judgment of invalidity of the claims based on the other nine grounds, as summarized in the chart (Exhibit A) and which are set forth in the affirmed Final Judgment of the District Court in paragraphs 10 through 21 (Petitioner's App. pp. A-34 - A-36). Thus, even if this Court were to grant Certiorari and reverse on the issue presented by Allen, the claims of the '799 patent would remain invalid.

The jury found the subject matter of all claims of the patent-in-suit to be in public use and on sale more than one year before the filing date of the patent application (Pet. App. p. A-47). Based on these interrogatory answers, the District Court entered judgment that the patent was invalid under 35 USC §102(b) which states:

A person shall be entitled to a patent unless -

...

(b) the invention was ... in public use or on sale in this country, more than one year prior to the date of application for patent ...."

The issue of concealment as it applies to 35 USC §102(g) that is now so heartily advanced by Allen was not an issue in the case when presented to the jury. Judge Grady did not include a special interrogatory on this issue when the interrogatories were prepared and assembled in a conference in his chambers at the close of trial because it simply was not a contested issue. Neither party objected to the omission of an interrogatory directed to this "issue" and the Court of Appeals for the Federal Circuit concluded that Allen had waived its challenge to the jury instructions (Pet. App. A-11).

When defendant Kimball attempted to introduce at trial additional depositions to corroborate disclosure of the Wescott and Bauscher organs, the trial judge would permit only two depositions and indicated that if it became a bone of contention, additional evidence could be introduced later on. However, both sides waived this issue because it was no longer an issue in the case at trial, and a special interrogatory on concealment was not submitted to the jury.

The Court of Appeals for the Federal Circuit affirmed the invalidity judgment of the District Court, not by reliance on 35 USC §102(g), but by reliance on the subject matter of the claims of the patent having been in public use and on sale more than one year prior to the critical date:

"In the case at bar the trial court's written judgment holding invalid all the claims of the '799 patent is supported by the jury findings that the subject matter of the claims was on sale and in public use in the inventor's own demonstrator. The judgment thus represented a reconciliation with the jury answers that all but two of these same claims were not invalid for obviousness. The jury could have answered that the claimed subject matter was unobvious at the time the invention was made, in light of prior patents or other publications or the prior devices of others. That reconciliation is supported by the structure of the interrogatories."

...  
"We conclude that the district court correctly held that all the claims of the '799 patent were invalid based on the jury's findings that the subject matter thereof had been in public use and on sale more than one year before the critical date, and that these findings are reconcilable with the jury's findings on unobviousness. Allen Organ's request that we order a new trial is denied." Allen Organ Company v. Kimball International, Inc. 839 F.2d. 1556 (Fed. Cir. 1988); Pet. App. pp. A-18, 21)

The Court of Appeals for the Federal Circuit affirmed the Court's judgment in its entirety, and Allen's Petitions for Rehearing and Rehearing in Banc were denied.

REASONS FOR DENYING THE  
PETITION FOR WRIT OF CERTIORARI

The precedent of this Court is well established that, if there are seemingly inconsistent jury answers to special interrogatories, if there is a view that makes such answers consistent, they must be resolved that way. Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd. 369 U.S. 355, 364 (1962). This Court has further stated in Gallick v. Baltimore and Ohio Railroad Company 372 U.S. 108, 119 83 S. Ct. 659, 9 L. ED. 2d 618 (1963):

"But it is the duty of the courts to attempt to harmonize

the answers, if it is possible under a fair reading of them ... We therefore must attempt to reconcile the jury's findings, by exegesis if necessary, ... before we are free to disregard the jury's special verdict and remand the case for a new trial."

Other Courts of Appeal have applied the law espoused by this Court in dealing with cases where there are seemingly inconsistent answers to jury special interrogatories. In Miller v. Royal Netherlands Steamship Company 508 F.2d 1103, 1106-7, (5th Cir. 1975), the Court stated:

"This court has stated that the test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted, ..." [emphasis added]

In construing the jury's interrogatory answers, the Court employed a

totality of circumstances overview including a review of the proofs adduced at trial, the conduct of the trial and the trial Court's instructions. Miller, supra at 1107.

Similarly, the Court in Aquachem Company, Inc. v. Olin Corporation, 699 F.2d 516, 521 (11th Cir. 1983) stated the test thusly:

"The test to be applied in reconciling apparent conflicts between the jury's answers is 'whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted,..."  
[emphasis added]

The flaw in Allen's argument as to why this Court should review this case is that Allen's reconciliation of the jury's interrogatory answers is not logical, probable or plausible. The reconciliation urged by Allen is that the jury had necessarily found the prior Wescott,

Bauscher and Klann/Conn organs to have been concealed. However, a specific jury interrogatory on concealment as it pertains to invalidity under 35 USC §102(g) was deliberately not submitted to the jury with the agreement of both parties and the trial judge. Rule 49(a) of the Federal Rules of Civil Procedure states in part:

"If ... the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the Court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."

Since concealment as an issue was waived by Allen and since Rule 49(a) states that the Court is deemed to have made a



finding in accordance with the judgment on the special verdict, Allen's "reconciliation" is totally implausible and illogical, and is dependent on this Court accepting the dubious premise that a legitimate issue existed, i.e. concealment of the prior art organs, when it was not acknowledged as an issue by the parties nor the judge when the case was submitted to the jury. In short, the Allen "reconciliation" may not "fairly be said to represent a logical and probable decision on the relevant issues as submitted". Miller, supra at 1106-7. Allen is attempting to inject an issue in this case which never existed in a last ditch attempt to reverse its losses at the District Court and Court of Appeals levels.

Where there is only one logical and plausible way to reconcile jury interrogatory answers, remand for a new trial is not permitted, as such would violate the prevailing party's Seventh Amendment right to a jury trial. For this reason alone, this case is not worthy of review by this Court, and the decision of the Court of Appeals should stand.

Even if Allen were to have a reasonable argument that the jury's answers on the 35 USC §102(g) and 35 USC §103 issues could be reconciled in two logical and plausible ways, Allen is asking this Court to review this case on an issue which was not relied on by the Court of Appeals in affirming the District Court's judgment. The jury found, in answering special interrogatories 5a-5d, that all claims of the '799 patent were in public

use and on sale prior to the critical date because of the patent owner's activities with respect to the demonstrator organ, which was the subject of extensive evidence at trial. The Court of Appeals for the Federal Circuit reconciled the jury's findings on the public use and on sale of the demonstrator organ with the jury's findings on obviousness, and denied Allen's request for a new trial (Pet. App. pp. A-18,21). This finding, which is completely dispositive of the case, is not challenged by Allen in its Petition. Allen appears to be asking this Court to review a decision of the Court of Appeals on an issue (invalidity under 35 USC §102(g)) which is not dispositive of the case and on which the Court of Appeals did not in any part base its decision in reconciling the

jury verdict and holding all claims of the patent invalid. This is yet another reason why this case should not be reviewed by this Court.

Neither the District Court nor the Court of Appeals made any redetermination of the facts as argued by Allen in its Petition. The Court interpreted the facts found by the jury and then rendered the legal conclusion that all claims of the patent were invalid.

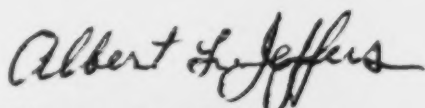
#### CONCLUSION

In its attempt to convince this Court to review this case, Allen is relying on a hypothetical, fictitious issue, namely, its allegation that there are two ways to reconcile the jury's interrogatory answers. There is, however, only one logical way to reconcile the jury's answers, which is

the way that the answers were reconciled by the District Court and the Court of Appeals. Furthermore, the issue argued by Allen would not be dispositive of the case and is not the issue on which the Court of Appeals affirmed the judgment holding all claims of the patent invalid.

For these reasons, respondent believes that this case is not appropriate for review by this Court, and therefore prays that Allen's Petition for Writ of Certiorari be denied.

Respectfully submitted,


A handwritten signature in cursive script, reading "Albert L. Jeffers".

Albert L. Jeffers  
Counsel of Record  
John F. Hoffman  
JEFFERS, HOFFMAN & NIEWYK  
1500 Anthony Wayne Bldg.  
Fort Wayne, IN 46802  
(219) 426-1700

CERTIFICATE OF SERVICE

I, Albert L. Jeffers, a member of the Bar of the Supreme Court of the United States, hereby certify that on this date, August 3, 1988, I did serve the requisite number of copies of the foregoing upon counsel for Petitioner, by mailing the same, first class postage prepaid and addressed as follows:

David H. Pfeffer  
MORGAN & FINNEGAN  
345 Park Avenue  
New York, New York 10154

  
Albert L. Jeffers  
Attorney for Respondent  
JEFFERS, HOFFMAN & NIEWYK  
1500 Anthony Wayne Bldg.  
Fort Wayne, IN 46802  
(219) 426-1700

